Filed 5/24/19 In re D.E. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.E., a Person Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent; W.E. et al., Defendants and Appellants.	E071795 (Super.Ct.No. RIJ1200346) OPINION

APPEAL from the Superior Court of Riverside County. Walter H. Kubelun, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Roni Keller, by appointment of the Court of Appeal, for Defendant and Appellant W.E. (father).

Terence M. Chucas, by appointment of the Court of Appeal, for Defendant and Appellant A.E. (mother).

Gregory P. Priamos, County Counsel, and James E. Brown, Guy B. Pittman, and Prabhath Shettigar, Deputy County Counsel for Plaintiff and Respondent.

The parents appeal a judgment terminating their parental rights to D.E., who was approximately nine months old when the Riverside County Department of Public Social Services (DPSS) filed a juvenile dependency petition based on allegations of neglect, domestic violence between the parents, and the parents' extensive history of methamphetamine use. Mother had previously lost custody of a child due to her drug use and failed to reunify, resulting in a denial of reunification services for mother respecting D.E., although the court granted services to father. After impressive efforts at overcoming their drug use, the parents briefly reunified with the minor, only to have him removed a month after that return, based on their relapse into drugs. Upon sustaining a petition pursuant to Welfare and Institutions Code, section 387,[1] the court denied further services and scheduled a hearing pursuant to section 366.26, where the court terminated parental rights.

On appeal, the parents argue that the trial court erroneously concluded that the "beneficial parent-child relationship" did not provide a compelling reason to conclude that termination of parental rights would be detrimental to the child. We affirm.

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

BACKGROUND

D.E. was born in 2015 and entered foster care when the Riverside Department of Public Social Services (DPSS) detained him at the age of nine months. The initial referral came in June 2016, alleging that both parents were abusing drugs, particularly methamphetamine, while living with a relative, in the company of other drug users, that the parents engaged in domestic violence, and that mother had a mental health history for which she did not take her medication. The parents acknowledged the drug use, domestic violence and mother's untreated schizophrenia.

Mother had a prior child welfare history involving an older child, A.P., D.E.'s half-sibling, who was removed for the same reasons (use of methamphetamines, untreated mental health issues, and allowing other drug users to live in the home) between 2007 and 2013. Mother had been given reunification services in the case of A.P., had briefly reunited with the child, but quickly relapsed, and lost custody again following a supplemental petition pursuant to section 387. A.P. was placed in the sole legal and physical custody of his father in northern California and that case had been closed.

As for D.E., the first amended petition was filed on August 15, 2016, alleging the drug use and domestic violence of the parents, as well as the detrimental condition of the home and general neglect, within the meaning of section 300, subdivision (b)(1). The petition further alleged that mother had a chronic, unresolved history of substance abuse, as well as a prior DPSS history regarding A.P., with whom she failed to reunify. The

parents entered a substance abuse program on September 29, 2016. They waived their trial rights at the adjudicatory hearing, and the court took jurisdiction over D.E. on October 12, 2016.

The disposition hearing took place on November 14, 2016, in the parents' absence. Custody of D.E. was removed from the parents, and family reunification services were ordered for father, but mother was denied services pursuant to section 361.5, subdivision (b)(10).

By the time of the six-month status review, father had made progress on his case plan, causing DPSS to recommend liberalizing visitation to include overnight visits. Father had completed parenting education, and was compliant with his substance abuse treatment and counseling program. During the same period, mother filed a Request to Change Court Order (JV-180) seeking an order for reunification services based on the fact she had engaged in family preservation services on her own and made excellent progress. At the six-month review hearing held on June 13, 2017, the court granted mother's request, ordered six months of reunification services for her, and extended services for father, liberalizing visitation for both parents to include overnights.

D.E. was eventually placed in his parents' custody on August 11, 2017, with a formal return of custody under a family maintenance plan on October 12, 2017. Things went well until November 2017, just one month after D.E. had been returned, when the parents' substance abuse counselor notified the social worker that the parents had not participated for two weeks and had not responded to attempts at communication. When

the social worker made contact with them, they admitted to a relapse a week earlier, but an on-demand drug test revealed more recent use of methamphetamine.

On November 14, 2017, DPSS filed a supplemental petition alleging that the prior disposition had been ineffective, and D.E. was detained in foster care pending an assessment of a relative caretaker. The social worker attempted to place D.E. in the same foster home in which he had been placed prior to being returned to his parents, but that foster home was at full capacity. Although the former foster mother wanted placement of D.E., DPSS was in the process of conducting a relative assessment of mother's sister, D.P. in Los Angeles. In any event, the former foster parents eventually expressed a desire for legal guardianship of D.E. rather than adoption, so they ceased to be considered as a placement for D.E.

The petition was sustained on January 23, 2018 at the jurisdiction hearing. The parents promptly resumed substance abuse treatment, but on February 26, 2018, at the disposition hearing on the supplemental petition, the court denied further reunification services to both parents and set a hearing to select and implement a permanent plan of adoption. At that time, visitation was reduced to one time per week, supervised.

The parents continued with services on their own and attended visits. The social worker observed a visit in March 2018, where the parents appeared to have difficulty engaging with D.E., and seemed overwhelmed when he threw an "age appropriate" tantrum. The child's caretaker reported that this was a typical visit. On a typical visit,

mother would have to encourage father to engage with D.E. On June 11, 2018, D.E. was removed from his previous foster parents and placed with a prospective adoptive family.

On August 29, 2018, mother filed a JV-180, challenging the order placing D.E. with nonrelative prospective adoptive parents, and urged the court to place him with K.P., one of her sisters. She outlined her earlier request for relative placement at the time of D.E.'s removal pursuant to the supplemental petition, and the efforts of her sisters, K.P. and D.P., to complete the relative assessment process.

Responding to the petition, the social worker acknowledged the applications of the two sisters to be evaluated for relative placement. However, the social worker also noted that K.P. had been eliminated from consideration due to the fact her brother, a known drug user, also lived in her residence. As for D.P., a schoolteacher who met most of the placement criteria, the social worker recommended not placing D.E. with her because the mother admitted D.P. wanted her (mother) to regain custody. As a result, the social worker was concerned that the relatives would be unable to protect D.E. and would return him to his parents' custody.

On October 18, 2018, the court denied mother's change-order request and mother appealed that order. That appeal was ultimately dismissed after appointed counsel filed a letter brief indicating a lack of arguable issues. (Ref. *In re Phoenix H.* (2009) 47 Cal.4th 835; *In re Sade C.* (1996) 13 Cal.4th 952.)[2]

[2] On December 4, 2018, mother filed yet another JV-180 regarding placement of D.E. with D.P., requesting that the court conduct a hearing pursuant to section 361.3.

On October 24, 2018, the social worker submitted an adoption assessment of the adoptive family, recommending adoption, as well as an addendum report for the section 366.26 hearing. The reports indicated that the parents continued to live in a residence where substance abuse occurred. They also indicated that D.E. was thriving in his prospective adoptive home, where he was well-cared for and bonded to the adoptive parents. D.E. called them "mom" and "dad."

On October 24, 2018, mother filed a JV-180 seeking reinstatement of reunification services. Her petition alleged that she had completed a family preservation substance abuse program, where she had voluntarily participated in a recovery services treatment program, had stable housing, and was working as a part-time caretaker. Father also filed a JV-180 for reinstatement of reunification services, including similar allegations.

DPSS's post-permanency status review report (§ 366.3), and recommended adoption by the current prospective adoptive parents was the most appropriate permanent plan for D.E. The report indicated that mother was working as an in-home caretaker of her father, earning $1400 per month, and father was working at a warehouse earning $19.50 per hour. The parents visited one time per week and visits appeared to go well, with the parents actively playing with D.E., although father sometimes needed encouragement from mother to engage in the visits.

In an addendum report filed November 28, 2018, the social worker addressed the parents' respective 388 petitions, recommending denial of their requests to reinstate services and termination of parental rights. The report noted that in mother's prior

dependency involving D.E.'s half-sibling, she went through the same cycle of completing services, and reunifying with the minor, only to relapse and lose custody by way of a section 387 petition due to her drug relapse. As for father, the social worker acknowledged his efforts to mitigate issues, but concluded he had not benefitted from them. The social worker recommended that both parents' petitions be denied because neither parent had demonstrated any behavioral changes that would allow for D.E.'s safe return.

On December 4, 2018, the court conducted combined hearings on the parents' section 388 petitions, the section 366.3 post-permanency hearing, and the hearing pursuant to section 366.26. The court denied the modification petitions of both parents, including mother's request for a hearing on the relative placement preference pursuant to section 361.3. The court then found it was likely the child will be adopted, and that termination of parental rights would not be detrimental in that none of the exceptions contained in section 366.26, subdivision (c)(1)(A) and (B) were applicable and terminated parental rights. The court ordered that an adoption petition by the current caregivers, who were granted de facto parent status, be given preference.

Both parents appealed.

DISCUSSION

The Trial Court Correctly Determined that Termination of Parental Rights Would Not Be Detrimental.

On appeal, father argues (1) the court erred in terminating parental rights due to the existence of a beneficial parent-child relationship, and (2) that if the judgment terminating mother's parental rights is reversed, the judgment as to father must be reversed, also. For her part, mother argues that the court erred in not applying the beneficial parent-child exception to adoption and joins father's brief to the extent his arguments inure to her benefit. Both parents argue that the court erred in concluding that termination of parental rights would not be detrimental to the child where they had satisfied their burden of showing that they had maintained regular visitation and that preserving the parent-child relationship was in D.E.'s best interests. We disagree.

In relevant part, section 366.26, subdivision (c)(1) provides that if the court determines that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption, unless the court finds a compelling reason for determining that termination would be detrimental to the child where the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)

If the parents have failed to reunify and the court has found the child likely to be adopted, the burden shifts to the parents to show the exceptional circumstances that would make termination of parental rights detrimental to the child. (*In re Grace P.* (2017) 8 Cal.App.5th 605, 611, citing *In re Autumn H.* (1994) 27 Cal.App.4th 567, 574; see also *In re L.S.* (2014) 230 Cal.App.4th 1183, 1199.) One such exceptional circumstance applies when the parents have maintained regular visitation and contact

with the child, and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)

Appellate courts have reached differing conclusions as to the appropriate standard of review, although recently a hybrid approach has been adopted. (*In re E.T.* (2018) 31 Cal.App.5th 68, 76.) We review a trial court's factual findings as to a claim relating to the applicability of the beneficial relationship exception under the substantial evidence standard, and we review the court's determination as to whether that relationship provides a compelling justification for foregoing adoption under the abuse of discretion standard.

The parent has the burden of proving the statutory exception applies. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) "The first prong is quantitative and relatively straightforward, asking whether visitation occurred regularly and often." (*In re Grace P.*, *supra*, 8 Cal.App.5th at p. 612.) "It is not an inquiry into the quality of visitation; this prong simply evaluates whether the parent consistently had contact with the child." (*Ibid.*, citing *In re I.R.* (2014) 226 Cal.App.4th 201, 212.) The second prong requires a parent to prove that the bond between the parent and child is sufficiently strong that the child would suffer detriment from its termination. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 450.)

A showing that the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 646.) No matter how loving and frequent the contact, the

parents must show they occupy a "parental role" in the child's life. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) In applying this exception, the court must consider numerous variables, including the age of the child, the portion of the child's life spent in the parent's custody, the "positive" or "negative" effect of interaction between parent and child, and the child's particular needs. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

Here, the record supports the fact that the parents visited regularly and that the visits went well. Although the trial court did not expressly address the first prong of the exception, it appears safe to assume the parents had satisfied it by maintaining consistent visits and contact with D.E. However, as to the existence of a parental bond which would provide a compelling reason to forego adoption, there is, as counsel for father acknowledged at the hearing, a vacuum of information as to the nature and strength of the parent-child relationship.

Mother testified that D.E. was affectionate with the parents, that he ran to the parents at the beginning of visits and was sad at the end. She also testified that D.E. called her "mom," but that he called father "Uncle W." This evidence was countered by the social worker's report indicating that the foster parents' observation of the visits showed the parents became overwhelmed by D.E.'s tantrums and on a typical visit had trouble engaging with the child. Further, D.E. referred to his prospective adoptive parents as "mom" and "dad."

Thus, while the parents may have had a bond with D.E., it was not necessarily reciprocated. This is highlighted by the closing argument of mother's counsel, who was careful to frame his argument against termination of parental rights in terms of mother's "perception" that there was a strong bond. But, mother's testimony was insufficient to show that D.E.'s bond with her was the type of attachment that would overcome the preference for adoption and the child's need for stability.

Similarly, at the hearing, father's counsel acknowledged that the burden was on the parents to prove the existence of a bond but argued that it was DPSS who left a "vacuum" of information regarding the parent-child bonds. Father relied on mother's testimony to argue that the evidence of a bond was not refuted. Father failed to meet the burden of establishing a parental bond, particularly where D.E. referred to him as "Uncle W." at visits.

Mother's reference to the relative length of time that D.E. was in the parents' custody as compared with the time in which D.E. has been placed with his prospective adoptive parents overlooks a glaring problem: It is true that the prospective adoptive parents had only had D.E. placed with them for six months prior to the 366.26 hearing. However, the parents did not have him in their custody for the majority of his life. Moreover, during the majority of the time in which mother and father had custody of D.E., even after he was returned to their custody, they were abusing drugs and mother was ignoring her mental health problems. In fact, there was no evidence even in mother's latest section 388 application that she had ever sought out treatment for her

mental health and was compliant with medications, one of the presenting problems in the case.

The parents' reliance on the holding of *In re E.T., supra,* 31 Cal.App.5th 68, is misplaced. In that case, the record demonstrated that the four-year-old twins, who had lived almost half their lives with mother, were "very tied to mother." (*Id.,* at p. 77.) Here, there is no evidence D.E. was "very tied" to either parent, and his time in the parents' custody, while they engaged in substance abuse, amounted to approximately one-third of his very young life.[3]

Thus, while parents visited regularly and had a bond with the child, there is no evidence of the nature of the child's bond with the parents and even less evidence that the strength and quality of the natural parent/child relationship in a tenuous placement outweighs the security and the sense of belonging that the prospective adoptive parents would confer. (See *In re E.T., supra,* 31 Cal.App.5th at p. 77.)

There is substantial evidence to support the trial court's factual findings; the court did not abuse its discretion in determining that there was no compelling reason to forego adoption. Because we do not reverse the judgment as to either parent, we do not need to address any claim that the judgment should be reversed as to both parents.

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[3] D.E. was nine months of age when initially detained and was returned to the parents' custody for nearly three months.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

SLOUGH
J.

FIELDS
J.